

# MAINE STATE LEGISLATURE

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(EMERGENCY)  
FIRST REGULAR SESSION

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ONE HUNDRED AND THIRTEENTH LEGISLATURE

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Legislative Document

NO. 208

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H.P. 167                      House of Representatives, February 3, 1987  
Reference to the Committee on Banking and Insurance  
suggested and ordered printed.

EDWIN H. PERT, Clerk

Presented by Speaker MARTIN of Eagle Lake.

Cosponsored by Senator PERKINS of Hancock, Representative  
PARADIS of Old Town and President PRAY of Penobscot.

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STATE OF MAINE

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IN THE YEAR OF OUR LORD  
NINETEEN HUNDRED AND EIGHTY-SEVEN

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1                      AN ACT to Amend the Maine Business  
2                      Corporation Act and the Maine  
3                      Nonprofit Corporation Act to Enable  
4                      Maine Stock and Nonstock Corporations  
5                      to Adopt Limits on Director Liability  
6                      and to Modernize Indemnification  
7                      Provisions.  
8

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9                      Emergency preamble. Whereas, Acts of the Legis-  
10                     lature do not become effective until 90 days after  
11                     adjournment unless enacted as emergencies; and

12                    Whereas, recent court decisions have resulted in  
13                    increased exposure to liabilities for directors of  
14                    both profit and nonprofit corporations; and

1           Whereas, as a result of these developments both  
2 profit and nonprofit corporations have found it in-  
3 creasingly difficult to attract and retain qualified  
4 directors who are able to lend their experience and  
5 expertise to guide these corporations; and

6           Whereas, the State corporate laws do not now af-  
7 ford a way for shareholders or members of corpora-  
8 tions to limit director liability in order to encour-  
9 age qualified persons to serve on their boards; and

10           Whereas, a number of other states have recently  
11 adopted provisions which enable shareholders and mem-  
12 bers to elect to limit these liabilities; and

13           Whereas, there are certain ambiguities in the  
14 state corporate laws relating to indemnification of  
15 corporate officers and directors which contribute to  
16 the problem of attracting and retaining qualified  
17 persons to serve state corporations; and

18           Whereas, these circumstances have a material neg-  
19 ative effect on the economic climate in the State and  
20 the ability of state businesses, especially fledging  
21 companies which have the most difficulty attracting  
22 and the greatest need for qualified directors, from  
23 achieving their potential; and

24           Whereas, in the judgment of the Legislature,  
25 these facts create an emergency within the meaning of  
26 the Constitution of Maine and require the following  
27 legislation as immediately necessary for the preser-  
28 vation of the public peace, health and safety; now,  
29 therefore,

30 Be it enacted by the People of the State of Maine as  
31 follows:

32           Sec. 1. 13-A MRSA §403, sub-§3-A is enacted to  
33 read:

34           3-A. In addition to the provisions required un-  
35 der this section, the articles of incorporation may  
36 contain a provision eliminating or limiting the per-  
37 sonal liability of a director to the corporation and  
38 its shareholders for monetary damages for conduct as

- 1 a director and the provision shall be effective in  
2 accordance with its terms, except that the provision  
3 shall not be effective to eliminate or limit the per-  
4 sonal liability of a director:
- 5 A. For acts or omissions which involve dishones-  
6 ty or intentional misconduct;
- 7 B. For acts or omissions which the director  
8 knows to be in violation of law;
- 9 C. For any transaction from which the director  
10 derives an improper personal benefit;
- 11 D. Arising under section 720; or
- 12 E. For acts or omissions occurring prior to the  
13 date when the provision becomes effective.

14 Sec. 2. 13-A MRSA §719, as repealed and replaced  
15 by PL 1975, c. 439, §7, is repealed and the following  
16 enacted in its place:

17 §719. Indemnification of officers, directors, em-  
18 ployees and agents; insurance

19 1. A corporation may indemnify or if so provided  
20 in the bylaws, shall indemnify in all cases any per-  
21 son who was or is a party or is threatened to be made  
22 a party to any threatened, pending or completed ac-  
23 tion, suit or proceeding, whether civil, criminal,  
24 administrative or investigative, by reason of the  
25 fact that he is or was a director, officer, employee  
26 or agent of the corporation, or is or was serving at  
27 the request of the corporation as a director, offi-  
28 cer, trustee, partner, fiduciary, employee or agent  
29 of another corporation, partnership, joint venture,  
30 trust, pension or other employee benefit plan or oth-  
31 er enterprise, against expenses, including attorneys  
32 fees, judgments, fines and amounts paid in settlement  
33 actually and reasonably incurred by him in connection  
34 with that action, suit or proceeding; provided that  
35 no indemnification may be provided for any person  
36 with respect to any matter for which he has been fi-  
37 nally adjudicated in any action, suit or proceeding  
38 if he is found:

1 A. To have acted dishonestly or in a manner  
2 knowingly opposed to the best interests of the  
3 corporation or its shareholders or, in the case  
4 of a person serving as a fiduciary of an employee  
5 benefit plan or trust, in a manner knowingly  
6 opposed to the best interests of that plan or  
7 trust or its participants or beneficiaries; or

8 B. With respect to any criminal action or pro-  
9 ceeding, to have had reasonable cause to believe  
10 that his conduct was unlawful.

11 The termination of any action, suit or proceeding by  
12 judgment, order or conviction adverse to that person,  
13 or by settlement or plea of nolo contendere or its  
14 equivalent, shall not of itself create a presumption  
15 that that person acted dishonestly or in a manner  
16 knowingly opposed to the best interests of the corpo-  
17 ration or its shareholders or, in the case of a per-  
18 son serving as a fiduciary of an employee benefit  
19 plan or trust, in a manner knowingly opposed to the  
20 best interests of that plan or trust or its partici-  
21 pants or beneficiaries and, with respect to any crim-  
22 inal action or proceeding, had reasonable cause to  
23 believe that his conduct was unlawful.

24 2. Any provision of subsection 1 or 3 to the  
25 contrary notwithstanding, to the extent that a direc-  
26 tor, officer, employee or agent of a corporation has  
27 been successful on the merits or otherwise in defense  
28 of any action, suit or proceeding referred to in sub-  
29 section 1, or in defense of any claim, issue or mat-  
30 ter therein, he shall be indemnified against ex-  
31 penses, including attorneys fees, actually and rea-  
32 sonably incurred by him in connection with any ac-  
33 tion, suit or proceeding. The right to indemnifica-  
34 tion granted by this subsection may be enforced by a  
35 separate action against the corporation, if an order  
36 for indemnification is not entered by a court in the  
37 action, suit or proceeding wherein he was successful  
38 on the merits or otherwise.

39 3. Any indemnification under subsection 1, un-  
40 less ordered by a court or required by the bylaws,  
41 shall be made by the corporation only as authorized  
42 in the specific case upon a determination that indem-  
43 nification of the director, officer, employee or

1 agent is proper in the circumstances and in the best  
2 interests of the corporation. That determination  
3 shall be made by the board of directors by a majority  
4 vote of a quorum consisting of directors who were not  
5 parties to that action, suit or proceeding or, if  
6 such a quorum is not obtainable or even if obtain-  
7 able, if a quorum of disinterested directors so di-  
8 rects, by independent legal counsel in a written  
9 opinion, or by the shareholders. Such a determina-  
10 tion, once made, may not be revoked and, upon the  
11 making of that determination, the director, officer,  
12 employee or agent, trustee, partner or fiduciary may  
13 enforce the indemnification against the corporation  
14 by a separate action notwithstanding any attempted or  
15 actual subsequent action by the board of directors.

16 4. Expenses incurred in defending a civil, crim-  
17 inal, administrative or investigative action, suit or  
18 proceeding as authorized in the specific case upon a  
19 determination made in the manner specified in subsec-  
20 tion 3, that the information then known to those mak-  
21 ing the determination, without undertaking further  
22 investigation, does not establish that indemnifica-  
23 tion would not be permissible under subsection 1 or,  
24 if so provided in the bylaws, shall be paid in all  
25 cases by the corporation in advance of the final dis-  
26 position of that action, suit or proceeding upon re-  
27 ceipt by the corporation of:

28 A. A written undertaking by or on behalf of the  
29 officer, director, employee, agent, trustee,  
30 partner or fiduciary to repay that amount if that  
31 person is finally adjudicated:

32 (1) To have acted dishonestly or in a man-  
33 ner knowingly opposed to the best interests  
34 of the corporation or its shareholders or,  
35 in the case of a person serving as a fiduci-  
36 ary of an employee benefit plan or trust, in  
37 a manner knowingly opposed to the best in-  
38 terests of that plan or trust or its partic-  
39 ipants or beneficiaries; or

40 (2) With respect to any criminal action or  
41 proceeding, to have had reasonable cause to  
42 believe that his conduct was unlawful; and

1 B. A written affirmation by the officer, direc-  
2 tor, employee, agent, trustee, partner or fiduci-  
3 ary that he has met the standard of conduct nec-  
4 essary for indemnification by the corporation as  
5 authorized in this section.

6 The undertaking required by paragraph A shall be an  
7 unlimited general obligation of the person seeking  
8 the advance, but need not be secured and may be ac-  
9 cepted without reference to financial ability to make  
10 the repayment.

11 5. The indemnification and entitlement to ad-  
12 vances of expenses provided by this section shall  
13 not be deemed exclusive of any other rights to which  
14 those indemnified may be entitled under any bylaw,  
15 agreement, vote of stockholders or disinterested di-  
16 rectors or otherwise, both as to action in his offi-  
17 cial capacity and as to action in another capacity  
18 while holding that office, provided that no such in-  
19 demnification may be provided for any person with re-  
20 spect to any matter as to which he shall have been  
21 finally adjudicated in any action, suit or proceed-  
22 ing:

23 A. To have acted dishonestly or in a manner  
24 knowingly opposed to the best interests of the  
25 corporation or its shareholders or, in the case  
26 of a person serving as a fiduciary of an employee  
27 benefit plan or trust, in a manner knowingly op-  
28 posed to the best interests of that plan or trust  
29 or its participants or beneficiaries; or

30 B. With respect to any criminal action or pro-  
31 ceeding, to have had reasonable cause to believe  
32 that his conduct was unlawful.

33 The indemnification provided by this section shall  
34 continue as to a person who has ceased to be a direc-  
35 tor, officer, employee, agent, trustee, partner or  
36 fiduciary and shall inure to the benefit of the  
37 heirs, executors and administrators of such a person.  
38 A right to indemnification required by the bylaws may  
39 be enforced by a separate action against the corpora-  
40 tion, if an order for indemnification has not been  
41 entered by a court in any action, suit or proceeding  
42 in respect to which indemnification is sought.

1           6. A corporation shall have power to purchase  
2 and maintain insurance on behalf of any person who is  
3 or was a director, officer, employee or agent of the  
4 corporation, or is or was serving at the request of  
5 the corporation as a director, officer, trustee,  
6 partner, fiduciary, employee or agent of another cor-  
7 poration, partnership, joint venture, trust, pension  
8 or other employee benefit plan or other enterprise  
9 against any liability asserted against him and in-  
10 curring by him in any such capacity, or arising out of  
11 his status as such, whether or not the corporation  
12 would have the power to indemnify him against such  
13 liability under this section.

14           7. For purposes of this section, references to  
15 the "corporation" shall include, in addition to the  
16 surviving corporation or new corporation, any partic-  
17 ipating corporation in a consolidation or merger.

18           Sec. 3. 13-B MRSA §403, sub-§4 is enacted to  
19 read:

20           4. Personal liability of a director. In addi-  
21 tion to the provisions required under this section,  
22 the articles of incorporation may contain a provision  
23 eliminating or limiting the personal liability of a  
24 director to the corporation and its members for mone-  
25 etary damages for conduct as a director and the provi-  
26 sion shall be effective in accordance with its terms,  
27 except that the provision shall not be effective to  
28 eliminate or limit the personal liability of a direc-  
29 tor:

30           A. For acts or omissions which involve dishones-  
31 ty or intentional misconduct;

32           B. For acts or omissions which the director  
33 knows to be in violation of law;

34           C. For any transaction from which the director  
35 derives an improper personal benefit; or

36           D. For acts or omissions occurring prior to the  
37 date when the provision becomes effective.

38           Sec. 4. 13-B MRSA §714, as amended by PL 1981,  
39 c. 470, Pt. A, §31, is repealed and the following  
40 enacted in its place:



1 §714. Indemnification of officers, directors, em-  
2 ployees and agents; insurance

3 1. Power to indemnify. A corporation may indem-  
4 nify or, if so provided in the bylaws, shall indemni-  
5 fy in all cases any person who was or is a party or  
6 is threatened to be made a party to any threatened,  
7 pending or completed action, suit or proceeding,  
8 whether civil, criminal, administrative or investiga-  
9 tive, by reason of the fact that he is or was a di-  
10 rector, officer, employee or agent of the corpora-  
11 tion, or is or was serving at the request of the cor-  
12 poration as a director, officer, trustee, partner,  
13 fiduciary, employee or agent of another corporation,  
14 partnership, joint venture, trust, pension or other  
15 employee benefit plan or other enterprise, against  
16 expenses, including attorneys fees, judgments, fines  
17 and amounts paid in settlement actually and reason-  
18 ably incurred in connection with that action, suit or  
19 proceeding; provided that no indemnification may be  
20 provided for any person with respect to any matter as  
21 to which he has been finally adjudicated in any ac-  
22 tion, suit or proceeding:

23 A. To have acted dishonestly or in a manner  
24 knowingly opposed to the best interests of the  
25 corporation or, in the case of a person serving  
26 as a fiduciary of an employee benefit plan or  
27 trust, in a manner knowingly opposed to the best  
28 interests of that plan or trust or its partici-  
29 pants or beneficiaries; or

30 B. With respect to any criminal action or pro-  
31 ceeding, to have had reasonable cause to believe  
32 that his conduct was unlawful.

33 The termination of any action, suit or proceeding by  
34 judgment, order or conviction adverse to that person,  
35 or by settlement or plea of nolo contendere or its  
36 equivalent, shall not of itself create a presumption  
37 that that person acted dishonestly or in a manner  
38 knowingly opposed to the best interests of the corpo-  
39 ration or, in the case of a person serving as a fidu-  
40 ciary of an employee benefit plan or trust, in a man-  
41 ner knowingly opposed to the best interests of that  
42 plan or trust or its participants or beneficiaries in  
43 good faith in the reasonable best interests of the

1 corporation and, with respect to any criminal action  
2 or proceeding, had reasonable cause to believe that  
3 his conduct was unlawful.

4       2. Indemnity against expenses. Any provision of  
5 subsection 1 or 3 to the contrary notwithstanding, to  
6 the extent that a director, officer, employee or  
7 agent of a corporation has been successful on the  
8 merits or otherwise in defense of any action, suit or  
9 proceeding referred to in subsection 1, or in defense  
10 of any claim, issue or matter therein, he shall be  
11 indemnified against expenses, including attorneys  
12 fees, actually and reasonably incurred in connection  
13 with any claim. The right to indemnification granted  
14 by this subsection may be enforced by a separate ac-  
15 tion against the corporation, if an order for indem-  
16 nification is not entered by a court in the action,  
17 suit or proceeding wherein he was successful on the  
18 merits or otherwise.

19       3. Indemnity made by corporation. Any indemnifi-  
20 cation under subsection 1, unless ordered by a court  
21 or required by the bylaws, shall be made by the cor-  
22 poration only as authorized in the specific case upon  
23 a determination that indemnification of the director,  
24 officer, employee or agent is proper in the circum-  
25 stances and in the best interests of the corporation  
26 applicable standard of conduct set forth in subsec-  
27 tion 1. The determination shall be made by the board  
28 of directors by a majority vote of a quorum consist-  
29 ing of directors who were not parties to that action,  
30 suit or proceeding or if a quorum of disinterested  
31 directors so directs, by independent legal counsel in  
32 a written opinion. Such a determination, once made,  
33 may not be revoked and, upon making the determina-  
34 tion, the director, officer, employee or agent,  
35 trustee, partner or fiduciary may enforce the indem-  
36 nification against the corporation by a separate ac-  
37 tion notwithstanding any attempted or actual subse-  
38 quent action by the board of directors.

39       4. Expenses incurred in defending action. Ex-  
40 penses incurred in defending a civil, criminal, ad-  
41 ministrative or investigative action, suit or pro-  
42 ceeding, as authorized in the specific case upon a  
43 determination made in the manner specified in subsec-  
44 tion 3 that the information then known to those mak-

1 ing the determination, without undertaking further  
2 investigation for purposes thereof, does not estab-  
3 lish that indemnification would not be permissible  
4 under subsection 1 or, if so provided in the bylaws,  
5 shall be paid in all cases by the corporation in ad-  
6 advance of the final disposition of that action, suit  
7 or proceeding upon receipt by the corporation of:

8 A. A written undertaking by or on behalf of the  
9 officer, director, employee, agent, trustee,  
10 partner or fiduciary to repay the amount if that  
11 person is finally adjudicated:

12 (1) To have acted dishonestly or in a man-  
13 ner knowingly opposed to the best interests  
14 of the corporation or, in the case of a per-  
15 son serving as a fiduciary of an employee  
16 benefit plan or trust, in a manner knowingly  
17 opposed to the best interests of that plan  
18 or trust or its participants or beneficia-  
19 ries; or

20 (2) With respect to any criminal action or  
21 proceeding, to have had reasonable cause to  
22 believe that his conduct was unlawful; and

23 B. A written affirmation by the officer, direc-  
24 tor, employee, agent, trustee, partner or fiduci-  
25 ary that he has met the standard of conduct nec-  
26 essary for indemnification by the corporation as  
27 authorized in this section.

28 The undertaking required by paragraph A shall be an  
29 unlimited general obligation of the person seeking  
30 the advance, but need not be secured and may be ac-  
31 cepted without reference to financial ability to make  
32 the repayment.

33 5. Provisions of indemnification. The indemnifi-  
34 cation and entitlement to advances of expenses pro-  
35 vided by this section shall not be deemed exclusive  
36 of any other rights to which those indemnified may be  
37 entitled under any bylaw, agreement, vote of disin-  
38 interested directors or otherwise, both as to action in  
39 his official capacity and as to action in another ca-  
40 capacity while holding that office, provided that no  
41 such indemnification may be provided for any person

1 with respect to any matter as to which he shall have  
2 been finally adjudicated in any action, suit or pro-  
3 ceeding:

4 A. To have acted dishonestly or in a manner  
5 knowingly opposed to the best interests of the  
6 corporation or, in the case of a person serving  
7 as a fiduciary of an employee benefit plan or  
8 trust, in a manner knowingly opposed to the best  
9 interests of that plan or trust or its partici-  
10 pants or beneficiaries; or

11 B. With respect to any criminal action or  
12 preceeding, to have had reasonable cause to be-  
13 lieve that his conduct was unlawful.

14 The indemnification provided by this section shall  
15 continue as to a person who has ceased to be a direc-  
16 tor, officer, employee, agent, trustee, partner or  
17 fiduciary and shall inure to the benefit of the  
18 heirs, executors and administrators of such a person.  
19 A right to indemnification required by the bylaws may  
20 be enforced by a separate action against the corpora-  
21 tion, if an order for indemnification has not been  
22 entered by a court in any action, suit or proceeding  
23 in respect to which indemnification is sought.

24 6. Power to purchase and maintain insurance. A  
25 corporation shall have power to purchase and maintain  
26 insurance on behalf of any person who is or was a di-  
27 rector, officer, employee or agent of the corpora-  
28 tion, or is or was serving at the request of the cor-  
29 poration as a director, officer, trustee, partner,  
30 fiduciary, employee or agent of another corporation,  
31 partnership, joint venture, trust, pension or other  
32 employee benefit plan or other enterprise against any  
33 liability asserted against him and incurred by him in  
34 any such capacity, or arising out of his status as  
35 such, whether or not the corporation would have the  
36 power to indemnify him against that liability under  
37 this section.

38 7. Corporation defined. For purposes of this  
39 section, the "corporation" shall include, in addi-  
40 tion to the surviving corporation or new corporation,  
41 any merging or consolidating corporation in a consol-  
42 idation or merger.

1           Sec. 5. 24-A MRSA §2303, sub-§1, ¶C, as amended  
2 by PL 1985, c. 372, Pt. B, §3, is further amended to  
3 read:

4           C. Due consideration shall be given:

5           (1) To past and prospective loss experience  
6           within and outside this State;

7           (2) To the conflagration and catastrophe  
8           hazards;

9           (3) To a reasonable margin for underwriting  
10          profit and contingencies;

11          (4) To dividends, savings or unabsorbed  
12          premium deposits allowed or returned by in-  
13          surers to their policyholders, members or  
14          subscribers;

15          (5) To past and prospective expenses both  
16          countrywide and those specially applicable  
17          to this State;

18          (6) To all other relevant factors within  
19          and outside this State;

20          (6-A) In the case of workers' compensation  
21          rates, consideration shall be given to the  
22          information required to be filed under Title  
23          39, section 22-D, subsections 4 and 5; and

24          (7) In the case of fire insurance rates,  
25          consideration shall be given to the experi-  
26          ence of the fire insurance business during a  
27          period of not less than the most recent  
28          5-year period for which such experience is  
29          available; and

30          (8) In the case of director liability in-  
31          surance rates, consideration shall be given  
32          to actions taken by a corporation pursuant  
33          to Title 13-A, section 403, or Title 13-B,  
34          section 403, to limit the personal liability  
35          of its directors.

